Supreme Court, U.S.
FILED
JUN 10 1991
OFFICE OF THE CLERK

(3)

No. 90-1533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PHILIP CARDILLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

DONALD V. MORANO
(Counsel of Record)
1231 Jarvis Avenue
Chicago, Illinois 60626
(312) 761-6201

Counsel for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
DISCUSSION OF QUESTION 1	1
DISCUSSION OF QUESTION 2	4
DISCUSSION OF QUESTION 3	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	PAGE
Johnson v. Zerbst, 304 U.S. 458 (1938)	3
United States v. Gagnōn, 470 U.S. 522 (1985)	2, 3
United States v. Northrup, 482 F. Supp. 1032 (D. Nevada 1980)	6, 7
United States v. Roth, 777 F.2d 1200 (7th Cir. 1985)	6
Constitution, Statutes and Rules	
Fifth Amendment Due Process Clause	2
21 U.S.C. § 848	4, 5
Rule 43, Federal Rules of Criminal Procedure	2
Rule 51, Federal Rules of Criminal Procedure	4
Rule 52(a) and (b), Federal Rules of Criminal Procedure	4
Rule 403, Federal Rules of Evidence	7
Rule 803(1) and (2), Federal Rules of Evidence	7

No. 90-1533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PHILIP CARDILLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

1a. *On Question 1*, the Court should grant a writ of certiorari, to clarify and define the contours of a defendant's constitutional right to be present at trial. The facts of the instant case make it an especially appropriate case for the Court to review. Mr. Cardilli was in custody during the trial. He suffered excruciating pain that forced him to be rushed from the court to the hospital before the judge brought in the jury. The trial continued in his absence. He was not present for closing arguments of co-Defendants, the Governmental rebuttal summary, or the

charge to the jury. The court neither consulted with Petitioner's attorney nor gave the jury any explanation about Petitioner's absence.

In such a setting, was the court below correct in holding that the failure by Petitioner's attorney to object to the continuation of trial in the absence of his client constituted a waiver of that right? Or, as the court below maintained, alternatively, was any continuation of the trial in Petitioner's absence harmless error?

Rather, as we have discussed in our petition, must not such a waiver be a personal waiver by Petitioner, which, obviously, is precluded by the circumstances of Petitioner's emergency departure from the courtroom? Further, must not this Court find that the failure of the trial judge to explain the reason for Petitioner's absence, as a matter of law, cannot be harmless error?

The Court has announced in *United States v. Gagnon*, 470 U.S. 522, 529 (1985), that a defendant's right under Rule 43, Federal Rules of Criminal Procedure, "to attend certain 'stages of the trial' which do not take place in open court" is not a constitutional right. Therefore, the Court held that failure by defendant to invoke his right to be present under Rule 43 at a conference he knows is taking place between the judge and a juror constitutes a valid waiver. *Id.*

In the instant case, however, there was no opportunity for Petitioner to object to the continuation of the trial. More importantly, the absence of Petitioner was to crucial stages of the trial *in open court—i.e.*, closing arguments and jury instructions. The right that Petitioner is asserting here is therefore more than a simple statutory right. It is his right under the Fifth Amendment Due Process Clause.

The Court must decide when, if ever, does a defendant's right to be present at a stage of the trial in open court fail to rise to more than a statutory right. What is the minimal absence of a defendant from a trial that constitutes a violation of his Fifth Amendment rights, absent a voluntary "relinquishment of [that] . . . right"? *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). What factors should reviewing courts consider in determining whether or not the defendant's absence constitutes no more than harmless error or, instead, requires that he be granted a new trial? Further, at what point, if any, does the defendant's absence become a per se violation of his right and constitute plain error, thereby entitling him to a new trial?

Specifically, in the circumstances of the instant case, must any waiver of Petitioner's right be precluded as a matter of law? Must not the Court find that the violation rose to a constitutional violation, and that it was not harmless error? Further, was this violation such a basic violation of Petitioner's rights that it is not subject to the harmless error doctrine?

1b. The Government brief in opposition to our petition has gratuitously assumed that Petitioner's absence from the trial did not rise to the level of a constitutional violation. The Government gratuitously has assumed this without acknowledging the distinction of Chief Justice Rehnquist in *Gagnon*, *supra*, between the absence of the defendant from the conference between the judge and a juror, and such an absence that rises to a violation of a defendant's Fifth Amendment rights. Indeed, the Government is guilty of question begging, arguing that Petitioner's due process rights were not violated because his "brief absence from trial did not result in a constitutional violation . . . ." (Govt. 7-8 n.5).

We see dramatically the unresponsiveness of the Government in its failure even to mention "harmless error." The Government assumes that the absence of Petitioner did not raise a constitutional issue. It invokes Rule 51, Federal Rules of Criminal Procedure, as dispositive—namely, that failure by counsel for Petitioner to object, contemporaneously, to Petitioner's absence from the trial constituted a waiver of the right. Rule 51, however, is the standard for reviewing simple trial error that does not rise to the level of a violation of constitutional rights.

Instead of this question-begging, the Government should have addressed the constitutional issues raised in our petition, which we have again presented above. To do this, Rule 52 rather than Rule 51 is the appropriate rule. The Court should grant this petition to define the contours of "harmless error" [Rule 52(a)] and of "plain error" [Rule 52(b)] as it applies to Petitioner's absence from the stages of trial from which he was absent.

2a. Also, *on Question 2*, the Court should grant our petition. As we have argued in our petition, we believe that the Court should grant the writ on this question and summarily reverse Petitioner's conviction under 21 U.S.C. § 848. As we have argued in our petition, it is black-letter law that when, as in the instant case, there was only an uncorroborated admission of an element of the offense—*i.e.*, that Petitioner supervised at least five persons—there is unsufficient evidence as a matter of law to convict him of that offense.

Further, the so-called admission on the tape—that Petitioner had "reduced his crew *by* a fifth"—itself, as a matter of law, does not imply that Petitioner supervised at least five persons. *See* the discussion in our petition, p. 4, n.1. Accordingly, the Court should grant our petition

on this basis alone and remand with directions that Cardilli's conviction under § 848 be vacated.

However, if the Court believes that there are limitations to the rule about uncorroborated admissions *and* rejects our contention that the language on the tape makes no such admission, then the court should grant the petition on this issue in the ordinary way. In other words, the Court should determine what exceptions other than excited utterances during the commission of a crime, if any, make corroboration unnecessary.

2b. Notwithstanding the finding by the Court of Appeals to the contrary, the Government states that there *was* evidence, independent of Petitioner's admission to government informant, Gary Cole, that Petitioner managed at least five persons. This contention by the Government is demonstrably false.[1] Without further consideration, therefore, we ask the Court to accept the finding of the Court of Appeals that the admission on the tape was uncorroborated.

---

[1] Daniel Sims, William Cossin, and Vince were three persons about whom there was evidence at trial of Petitioner's supervision. The evidence at most established Petitioner's supervision of no more than one other person. That additional person is Frank Bahmann, who was allegedly a pilot in the August, 1983 importation of marijuana. However, the government never even mentioned him at trial as a person whom Petitioner supervised in the drug operation. The would-be fifth person, Steven Bucchiere (Govt. 3), as a matter of law can not be used at this point in time by the Government. Bucchiere was found not guilty on all counts except the conspiracy count. (App. 11). The Court of Appeals reversed his conviction on this count. (App. 12). The Court found that the evidence did not establish beyond a reasonable doubt that Bucchiere participated in the conspiracy, although there was testimony of his presence during the importation.

There are further legal and factual errors by the Government in contesting our claim that an uncorroborated admission of an element of the offense is insufficient as a matter of law. The Government is wrong in trying to claim that this rule applies only to those admissions made by persons in police custody. (Govt. 8-9). The Court in *United States v. Roth*, 777 F.2d 1200, 1206 (7th Cir. 1985), has gathered cases from different circuits that support the proposition that corroboration of the admission is still needed in cases that the admission is made to an informant rather than to a police officer.

The Government further contends that the requirement of corroboration "does not apply where, as here, the defendant made the statement at issue to a person believed to be an accomplice, while the crime was still in progress." (Govt. 9). The Government is twice inaccurate here. Cole, who had made the videotape, was in no sense of the word an "accomplice" or "confederate" of Petitioner, or a participant in the conspiracy. Cole knew of some of the conspirators but had nothing to do with the conspiracy. He was an informant, who ingratiated himself with Petitioner.

Second, "the crime was not still in progress"—at least regarding Petitioner. The conversation on the tape took place on February 2, 1985. The last time alleged in the indictment or the evidence introduced at trial that Petitioner was alleged to have supervised anyone was in August of 1983. Regardless of whether Petitioner was still a member of the conspiracy, this exception to the principle enunciated by the Government does not apply. The exception applies only to admissions uttered during the commission of a *substantive* crime. *United States v. Nor-*

thrup, 482 F. Supp. 1032, 1037 (D. Nevada 1980).[2] That clearly was not the case here. The alleged admission was made while Petitioner was in a state of intoxication just after he had totalled his car in a crash.[3]

3. Also, *on Question 3*, the Court should grant our petition. As we showed in our petition, the district court denied Petitioner every opportunity to challenge the admission of the videotape and to confront informant Cole regarding the circumstances that existed at the time he spoke with Petitioner during the two-hour period that he made the tape. The sole reasons that the district court gave for denying these motions was that Cole's statements were not relied on by the Government, and Cole did not testify. Therefore, Petitioner had no right to impeach Cole.

As we argued in our petition (Pet. 13-25), Petitioner had a constitutional right to confront Cole concerning the reliability and voluntariness of the so-called uncorroborated admission on the tape. He has such a constitutional right to due process and compulsory process in this case, just as a defendant has a right to contest a confession.[4]

---

[2] The court in *Northrup* explained the basis for admitting utterances made during the commission of a substantive crime as grounded in the exception to the hearsay rule based on excited utterances. *See* Rule 803(1) and (2), Federal Rules of Evidence.

[3] In *Northrup*, a case in which the defendant made the admission under similar circumstances to those of the instant case, the court explained why the admission was unreliable. At the time the defendant made the statements, he was drunk and obviously boasting and trying to impress a woman who seemed amenable to being so impressed. *Id.*, at 1038.

[4] Further, there is no Federal Rule of Evidence that even, arguably, can justify excluding this clearly relevant evidence. This evidence would have to be admitted under Rule 403. It is not cumulative, and there can be no argument whatsoever about any unfair prejudice to the Government by its admission.

3b. The only new justification the Government gives for the exclusion of this relevant evidence is the same one that it has given regarding Question 2—namely, that the admission was not made while Petitioner was in police custody. (Govt. 10). As we noted above, however, the same rules apply about the need to corroborate admissions that are made to an informant as to those that are made to a police officer.

CONCLUSION

For the reasons given in our petition and this brief, this Court should grant our petition for a writ of certiorari.

Respectfully submitted,

DONALD V. MORANO
(Counsel of Record)
1231 Jarvis Avenue
Chicago, Illinois 60626
(312) 761-6201

Counsel for Petitioner